

3-1-1991

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Recommended Citation

Bret W. Reich, *The Secured Creditor Exemption: A Fleeting Factor in Lender Liability Analysis under CERCLA*, 5 BYU J. Pub. L. 273 (1991).

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I. INTRODUCTION

The disposal of hazardous materials is a national problem. The horrifying discoveries at Love Canal sparked nationwide concern over the implications of hazardous waste disposal.¹ Public protests intensified over time to encourage governmental intervention and to demand effective treatment of the environmental problems that pollute every state in the nation.² In response, Congress enacted the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA or Superfund)³ to facilitate the cleanup of hazardous waste sites as well as to provide the necessary financing.⁴

The purpose of CERCLA is two-fold: first, to promptly and effectively cleanup hazardous waste sites, and second, to hold responsible parties liable for cleanup costs.⁵ Responsible parties include current "owners and operators"⁶ of a facility;⁷ prior owners and operators who

1. Hooker Chemical and Plastics Corporation had dumped 21,800 tons of toxic wastes into the Love Canal. L. Gruson, *Ex-Love Canal Families Get Payments*, N.Y. Times, Feb. 20, 1985, at B1, col. 1. Years after the disposal, residents of the Love Canal neighborhood began to suffer physical injuries ranging from a variety of cancers and mental retardation to persistent rashes and migraine headaches. A lawsuit brought by former residents against the company was settled for \$20 million. *Id.*

2. The General Accounting Office of the United States has found as many as 425,380 potential hazardous waste sites that require cleanup. *GAO Finds 425,380 Potential Superfund Sites: Florio Hits EPA for Delays in Site Assessments*, 18 Env't Rep. (BNA) 2043 (Jan. 22, 1988). The cost of cleaning up only 2,500 or 1% of these sites is estimated at more than \$22 billion. *Id.*

3. Pub. L. No. 96-510, 94 Stat. 2767 (1980) (codified in part as amended at 42 U.S.C. §§ 9601-9657 (1988)).

4. *Personal Liability for Hazardous Waste Cleanup: An Examination of CERCLA Section 107*, 13 B.C. ENVTL. AFF. L. REV. 643, 649-50 (1986). The Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) was enacted to fill in the gaps left under the Resource Conservation and Recovery Act (RCRA) that Congress enacted in 1976. *Id.*

CERCLA, which contained a \$1.6 billion Superfund to finance the cleanup of hazardous waste sites, was due to expire in 1985, but the Senate passed S51 to re-authorize CERCLA and to increase the Superfund to \$7.5 billion. *Senate Passes \$7.5 Billion Superfund Bill with Tax Administration Threatened to Veto*, 16 Env't Rep. (BNA) 931 (Sep. 27, 1985).

5. *United States v. Reilly Tar & Chem. Corp.*, 546 F. Supp. 1100, 1112 (D. Minn. 1982).

6. An individual or entity is considered an owner or operator, "in the case of any facility, title or control of which was conveyed due to bankruptcy, foreclosure, tax delinquency, abandonment, or similar means to a unit of State or local government, any person who owned, operated, or otherwise controlled activities at such facility immediately beforehand." 42 U.S.C. § 9601(20)(A)(iii).

7. 42 U.S.C. § 9607(a)(1). CERCLA defines facility as:

owned or operated any facility at the time "hazardous substances"⁸ were disposed of;⁹ any person who generates or arranges for disposal, treatment, or transport of hazardous substances;¹⁰ and any person who transports hazardous substance for which there is a release or a threatened release which causes the incurrence of response costs.¹¹ Responsible parties are liable for all costs of removal¹² or remedial action;¹³ damages for the injury, loss, or destruction of natural resources; and the cost of any health assessment or health effects study carried out under CERCLA.¹⁴ Certain parties, however, are exempt from liability under the statute.¹⁵ This note will examine the secured creditor exemp-

(A) any building structure, installation, equipment, pipe or pipeline (including any pipe into a sewer or publicly owned treatment works), well, pit, pond, lagoon, impoundment, ditch, landfill, storage container, motor vehicle, rolling stock, or aircraft, or (B) any site or area where a hazardous substance has been deposited, stored, disposed of, or placed, or otherwise come to be located; but does not include any consumer product in consumer use or any vessel.

42 U.S.C. § 9601(9).

8. Hazardous substances include:

(A) any substance designated pursuant to section 1321(b)(2)(A) of Title 33, (B) any element, compound, mixture, solution, or substance designated pursuant to section 9602 of this title, (C) any hazardous waste having the characteristics identified under or listed pursuant to section 3001 of the Solid Waste Disposal Act [42 U.S.C.A. § 6921] (but not including any waste the regulation of which under the Solid Waste Disposal Act [42 U.S.C.A. § 6901 et seq.] has been suspended by Congress), (D) any toxic pollutant listed under section 1317(a) of Title 33, (E) any hazardous air pollutant listed under section 112 of the Clean Air Act [42 U.S.C.A. § 7412], and (F) any imminently hazardous chemical substance or mixture with respect to which the Administrator has taken action pursuant to section 2606 of Title 15. The term does not include petroleum, including crude oil or any fraction thereof which is not otherwise specifically listed or designated as a hazardous substance under subparagraphs (A) through (F) of this paragraph, and the term does not include natural gas, natural gas liquids, liquefied natural gas, or synthetic gas usable for fuel (or mixtures of natural gas and such synthetic gas).

42 U.S.C. § 9601(14).

9. 42 U.S.C. § 9607(a)(2).

10. 42 U.S.C. § 9607(a)(3).

11. 42 U.S.C. § 9607(a)(4). Response costs include the cost of all removal or remedial action taken by the government or an Indian tribe; any other necessary response costs incurred by any person consistent with the national contingency plan; damages for injury, destruction, or loss of natural resources; and the costs of any health assessment or health effects study. 42 U.S.C. § 9607(a)(4)(A)-(D).

12. Removal means the cleanup of "released hazardous substances from the environment, [and] such actions as may be necessary . . . in the event of the threat of release of hazardous substances." 42 U.S.C. § 9601(23). Removal also includes actions necessary to "monitor, assess, and evaluate the release or threat of release . . . [and] the disposal of removed material [and other actions] necessary to prevent, minimize or mitigate damage to the public health or welfare or to the environment" 42 U.S.C. § 9601(23).

13. Remedial action includes those actions "consistent with permanent remedy taken instead of or in addition to removal actions." 42 U.S.C. § 9601(24).

14. 42 U.S.C. § 9607(a)(4)(A)-(D).

15. There is an exemption for innocent land owners, 42 U.S.C. § 9607(b)(3), and an exemp-

tion¹⁶ of CERCLA and the application of this exemption in the case of *United States v. Fleet Factors Corp.*¹⁷

The main question examined in *Fleet Factors* was whether a lender removes himself from the protection of the secured creditor exemption by possessing the ability to participate in the management of the borrower. More specifically, the question examined was whether the standard of liability should be based on capacity or ability to influence, instead of the previously used standard of liability based on actual participation.¹⁸ The Court of Appeals for the Eleventh Circuit concluded that a lender who possesses the capacity or ability to participate in the management of the borrower is liable under CERCLA. This note will show that (1) the Eleventh Circuit used a nebulous test in determining the scope of the secured creditor exemption, (2) subsequent application of the test will be detrimental to the environment and contradict the goals of CERCLA, and (3) alternative tests before Congress and the Environmental Protection Agency (EPA) discredit the credibility of the *Fleet Factors* test.

A. The Secured Creditor Exemption

The secured creditor exemption excludes from the definition of owner and operator "any person, who, without participating in the management of a vessel or facility, holds indicia of ownership primarily to protect his security interest in the vessel or facility."¹⁹ Originally this exemption was not included in CERCLA.²⁰ However, Congress added the exemption to protect from liability title holders who do not participate in the management of the facility and who are not affiliated in any way with the leasing or operating of the facility.²¹

tion for secured creditors, 42 U.S.C. § 9601(20)(A). This note will discuss only the latter.

16. See *infra* note 19 and accompanying text.

17. 724 F. Supp. 955 (S.D. Ga. 1988), *aff'd, remanded*, 901 F.2d 1550 (11th Cir. 1990), *cert. denied*, 111 S. Ct. 752 (1991).

18. See *United States v. Mirabile*, No. 84-2280, slip op. at 3 (E.D. Pa. Sept. 6, 1985).

19. 42 U.S.C. § 9601(20)(A)(iii) (1988).

20. See *United States v. Fleet Factors Corp.*, 901 F.2d 1550, 1558 n.11 (11th Cir. 1990), *cert. denied*, 111 S. Ct. 752 (1991) (citing S. 1480, 97th Cong., 2d Sess., *reprinted in* 2 SENATE COMM. ON ENVIRONMENTAL AND PUBLIC WORKS, 97TH CONG., 2D SESS., 1 A LEGISLATIVE HISTORY OF CERCLA 470 (Comm. Print 1983)).

21. *Id.* (citing remarks of Rep. Harsha, *reprinted in* 2 SENATE COMM. ON ENVIRONMENTAL AND PUBLIC WORKS, 97TH CONG., 2D SESS., 2 A LEGISLATIVE HISTORY OF CERCLA 945 (Comm. Print 1983)).

B. *Lender Liability Before Fleet Factors*

Prior to the enactment of environmental statutory relief, the common law doctrines of toxic tort and nuisance were the only remedies available for injuries resulting from improper hazardous waste disposal.²² In response to public outrage and the enormous cleanup costs of innumerable²³ contaminated sites around the country, the government created CERCLA and gave the EPA the authority to enforce CERCLA regulations.

CERCLA is armed with a large bore barrel of joint and several liability that fires with minimal precision, holding its victims strictly liable. While this method of broad sweeping liability serves to finance costly cleanup activities, it also causes extreme hardship to the parties involved. Recently, this view has allowed the courts to impose liability on lenders who foreclose on secured property that has been poisoned by previous owners.²⁴ In *Fleet Factors*, the Eleventh Circuit developed a test that will further expand lender liability under the façade of "cleaning up the environment," while neglecting the fundamental principle of causationally-linked liability.

II. UNITED STATES V. FLEET FACTORS CORP.

A. *The Facts*

In 1976, Fleet Factors Corp. (Fleet) entered into a factoring agreement with a cloth printing facility.²⁵ Fleet advanced funds against the assignment of the facility's accounts receivable and, in return, obtained a security interest in the facility and all of its equipment, fixtures, and inventory.²⁶ The cloth printing facility filed for bankruptcy under Chapter Eleven in 1979 and in December 1981 was adjudicated as bankrupt under Chapter Seven.²⁷ During this time, the factoring agreement continued under court order. On February 27, 1981, the facility discontinued operations and began to liquidate its inventory.²⁸

Fleet foreclosed on some of the facility's inventory and equipment

22. Ginsberg & Weiss, *Common Law Liability for Toxic Tort: A Phantom Remedy*, 9 HOFSTRA L. REV. 859, 864 (1981). These common law remedies have proven ineffective because of various legal obstacles that prevent recovery. *Id.* at 920-28.

23. See *supra* note 2.

24. *United States v. Maryland Bank & Trust Co.*, 632 F. Supp. 573, 579-80 (D. Md. 1986).

25. *United States v. Fleet Factors Corp.*, 901 F.2d 1550, 1553 (11th Cir. 1990), *cert. denied*, 111 S. Ct. 752 (1991).

26. *Id.*

27. *Id.*

28. *Id.*

in May 1982.²⁹ Fleet then hired a professional liquidator to auction off the collateral. After the auctioned collateral was removed (under the responsibility of the purchasers), Fleet hired a third party to remove the remaining collateral and to clean the premise.³⁰

The EPA inspected the facility on January 20, 1984, and incurred costs of nearly \$400,000 in responding to the toxic chemicals and asbestos contamination at the site. The cloth printing facility failed to pay taxes on the property; therefore, the facility was conveyed to the state of Georgia at a foreclosure sale on July 7, 1987.³¹

The government sued both the owners of the cloth printing facility and Fleet Factors under CERCLA to recover the cleanup costs.³² The district court granted the government's motion for partial summary judgment on the liability of the owners of the facility but denied the government's motion for partial summary judgment on the liability of Fleet.³³ Likewise, the court denied Fleet's cross motion for summary judgment because genuine issues of material fact existed concerning Fleet's activities at the facility. Fleet's request of interlocutory appeal was granted.³⁴ The Eleventh Circuit affirmed the district court's holding and remanded the case for further proceedings.³⁵

B. *The "Capacity to Influence" Test*

To achieve the "overwhelmingly remedial" goal of CERCLA, the Eleventh Circuit found Fleet potentially liable under the following test:

[A] secured creditor may incur section 9607(a)(2) liability, without being an operator, by participating in the financial management of a facility to a degree indicating a capacity to influence the corporation's treatment of hazardous wastes. It is not necessary for the secured creditor actually to involve itself in the day-to-day operations of the facility in order to be liable Nor is it necessary for the secured creditor to participate in the management decisions relating to hazardous waste. Rather, a secured creditor will be liable if its involvement with the management of the facility is sufficiently broad to support the inference that it could affect hazardous waste disposal decisions if it so chose.³⁶

The "capacity to influence" test employs a standard of ability to

29. *Id.*

30. This was accomplished by the end of December 1983. *Id.* at 1552-53.

31. *Id.* at 1553.

32. *Id.*

33. *Id.* at 1556.

34. *Id.* at 1553.

35. *Id.* at 1560.

36. *Id.* at 1557-58 (footnotes omitted).

influence instead of a standard of action. This standard is difficult to apply in practice, is impossible to measure, and sets no guidelines for future credit transactions.

C. Reasoning Used by the Eleventh Circuit

After refusing the government's argument that Fleet was liable under 42 U.S.C. 9607(a)(1),³⁷ the Eleventh Circuit addressed Fleet's liability under 9607(a)(2). Acknowledging that Fleet carried the burden of establishing its entitlement to the secured creditor exemption, the court viewed the critical issue to be whether Fleet participated in the management sufficiently to incur liability under the statute.³⁸

The Eleventh Circuit expressly rejected the test previously used by some district courts which differentiated between "permissible participation in the financial management of the facility and impermissible participation in the day-to-day or operational management of a facility."³⁹ The Eleventh Circuit found this "construction of the statutory exemption too permissive towards secured creditors who are involved with toxic waste facilities."⁴⁰ To achieve the goals⁴¹ of CERCLA, the court reasoned that "ambiguous statutory terms should be construed to

37. This section holds the owner and operator of a vessel or facility subject to liability. Under CERCLA, a state or local government that has acquired title to a facility due to tax delinquency (like the present case), or similar means, is not liable. Instead, the statute places liability on any person who owned, operated, or otherwise controlled activities at such facility immediately beforehand. 42 U.S.C. § 9601(20)(A)(iii) (1988).

38. *Fleet Factors*, 901 F.2d at 1555.

39. *Id.* at 1556. (citing *United States v. Mirabile*, No. 84-2280, slip op. at 3 (E.D. Pa. Sept. 6, 1985)) ("participation which is critical is participation in operational, production, or waste disposal activities"); *accord* *United States v. New Castle County*, 727 F. Supp. 854, 866 (D. Del. 1989); *Rockwell Int'l v. IU Int'l Corp.*, 702 F. Supp. 1384, 1390 (N.D. Ill. 1988). In *Mirabile*, a Pennsylvania federal district court held that a lender must be involved in the day-to-day operational affairs of the borrower before it can be held liable. *Mirabile*, No. 84-2280, at 3. Mere financial ability to control waste disposal practices was not considered sufficient for the imposition of liability. *Id.* The court examined the legislative history, which defined operator to be a person who is carrying out operational functions for the owner or the facility pursuant to an appropriate agreement. *Id.* This test enables both lender and debtor to know the extent of their respective liabilities and responsibilities governing the management of hazardous waste. While some claim that the "operational test" may allow creditors to indirectly manage the "affairs" of the debtor and at the same time dodge the liability bullet, these concerns appear minimal because of the well publicized examples of hazardous waste polluters currently experiencing the bankruptcy blues.

40. *Fleet Factors*, 901 F.2d at 1557. To date, the Ninth Circuit is the only other federal court of appeals to address the parameters of the "participating in the management" phrase. *Bergsoe Metal Corp. v. East Asiatic Co.*, 910 F.2d 668 (9th Cir. 1990). In *Bergsoe*, the Ninth Circuit refused to delineate specific guidelines for subsequent interpretation of the secured creditor exemption but noted that "there must be some *actual* management of the facility before a secured creditor will fall outside the exception." *Id.* at 672 (emphasis in original).

41. The goals of CERCLA are to cleanup hazardous waste sites and to hold responsible parties liable for the cost. See *supra* note 5 and accompanying text.

favor liability for the costs incurred by the government in responding to the hazards at such facilities.”⁴²

III. ANALYSIS

After opening the “pro-liability” door with the knock of ambiguity, the Eleventh Circuit turns the key of plain language to lock shut this same door from the district courts’ so-called broad interpretation.⁴³ The Eleventh Circuit construed the district courts’ interpretation⁴⁴ as “ignor[ing] the plain language of the exemption and render[ing] it meaningless.”⁴⁵

A. Plain Language of the Secured Creditor Exemption

“It is elementary that the meaning of a statute must . . . be sought in the language in which the act is framed, and if it is plain, the sole function of the courts is to enforce it according to its terms.”⁴⁶ The plain language of 9607(a)(2) seemingly absolves liability from the secured creditor who holds indicia of ownership in the facility without participating in the management of the facility.⁴⁷ The district court’s interpretation more closely parallels the plain language of the statute than that of the court of appeals.⁴⁸ The exemption specifically excludes from the definition of owner or operator any person who, without participating in the management of the facility, holds indicia of ownership to protect a security interest in the facility.⁴⁹ Therefore, secured credi-

42. *Fleet Factors*, 901 F.2d at 1557.

43. The court’s analysis here is suspect. First, the court labels the statutory terms as *ambiguous* and therefore reasons that the terms “must be construed to favor liability for the costs incurred by the government in responding to the hazards at such facilities.” *United States v. Fleet Factors Corp.*, 901 F.2d 1550, 1557 (11th Cir. 1990), *cert. denied*, 111 S. Ct. 752 (1991). This pro-liability presumption evolves from the remedial goals of CERCLA. Next, the court invokes the plain meaning doctrine and applies it to the same statutory terms it had previously labeled ambiguous. *Id.* This contradiction appears to be nothing more than judicial reasoning used to reach a desired end by simply brushing the issue of causation under a remedial rug.

44. The Eleventh Circuit termed the district court’s interpretation as awkward, “essentially requir[ing] a secured creditor to be involved in the operations of the facility in order to incur liability.” *Fleet Factors*, 901 F.2d at 1557.

45. *Id.*

46. *Caminetti v. United States*, 242 U.S. 470, 485 (1917).

47. This is true as long as ownership is held to protect the security interest and not used as an investment.

48. *Fleet Factors*, 901 F.2d at 1557. The Eleventh Circuit reasoned that those involved in the operations of a facility are already liable as operators under the statute. *Id.* Therefore, the court concluded that, “[h]ad Congress intended to absolve secured creditors from ownership liability it would have done so.” *Id.* This is precisely what Congress did by exempting secured creditors from liability as long as they didn’t participate in the management of the facility.

49. 42 U.S.C. § 9601(10)(A) (1988).

tors who do not cross the "participating in the management" line are not considered either operators or owners for liability purposes. In other words, Congress absolves secured creditors from ownership liability as long as they remain within the permissible boundaries.

B. Can the Secured Creditor Exemption Survive Fleet Factors?

The Eleventh Circuit's holding severely limits the scope of the secured creditor exemption, if not eliminating it completely. Under the court's view, a secured creditor can incur CERCLA liability by merely participating in the financial management of a facility if participation includes the capacity to influence the debtor's treatment of hazardous waste.⁵⁰ The Eleventh Circuit's rationale for narrowing the secured creditor exemption was to force creditors to thoroughly investigate the potential debtor's waste treatment systems and policies. If the potential creditor finds that the debtor's systems and policies do not meet the requirements set forth in the appropriate environmental statutes, the creditor will require the potential debtor to seek money from another source, to bear the cost of possible CERCLA liability weighed into the terms of the agreement, or to reconstruct its hazardous waste policies and systems to the satisfaction of the creditor.

The Eleventh Circuit's belief that secured creditors should police hazardous waste policy and management rests on supply and demand principles coupled with unjust enrichment. By holding lenders liable, the debtors of the world will be required to comply with the regulatory restrictions mandated by Congress or they will not obtain the financial support they need to operate. While these arguments appear theoretically sound, the practical application and consequence of a capacity to influence test is not nearly as persuasive. These results are not consistent with the goals of CERCLA. Little justification exists for making the secured creditor a monitor of hazardous waste systems and policies.⁵¹

50. The court noted that "a secured creditor will be liable if its involvement with the management of the facility is sufficiently broad to support the inference that it could affect hazardous waste disposal decisions if it so chose." *Fleet Factors*, 901 F.2d at 1558.

51. Under the current application of environmental regulations, financial institutions are required to perform environmental audits on a routine basis. There is no express statutory language that requires such audits. However, recent federal court decisions holding lenders potentially liable for cleanup costs has forced good business practice to include environmental reports. These audits can range from \$10,000 to \$50,000, or more, per audit. When conducted several times during the life of the loan, the increased transactional costs are tremendous. While a large portion of these costs will be shifted to the borrower, this increase disproportionately effects small business lenders and bluntly applies punitive measures on borrowers as a whole. The very possibility that the debtor's property may become polluted, which in turn can cause the lender to lose the entire value of the loan, is substantial incentive for the lender to conduct his affairs in an environmentally

C. The Effect of a Capacity to Influence Test

The test laid down by the Eleventh Circuit is extremely vague and will most likely frustrate the very goals it purports to achieve. Capacity⁵² to influence⁵³ can be interpreted in a myriad of ways.⁵⁴ Arguably, every lender could be held liable under the capacity to influence theory.⁵⁵ Until the courts have created a workable definition of this liability based on the capacity to influence, creditors will have a difficult time structuring their transactions to avoid potential liability.⁵⁶ This will force creditors to deny potential debtors the right to acquire necessary funds if the slightest risk of CERCLA liability is present, since the court will find that a lender who is aware of a debtor's potential CERCLA liability has the capacity to influence hazardous waste management. While the potential liability to lenders is devastating,⁵⁷ the effect of potential lender liability will also have a crippling ripple effect on farms and small businesses that ordinarily would be eligible for financial advancement (such as auto shops, gas stations, and dry cleaners).⁵⁸ Also, "[i]ncreased caution on lenders' part will probably result in more bankruptcies, since helping a borrower overcome financial difficulties will seldom be worth the risk of cleanup liability."⁵⁹

As the number of bankruptcies increase, the number of responsible parties that are financially capable of bearing the burden of cleanup

sensitive manner.

52. The applicable definition of capacity is "the legal authority or competence." WEBSTER'S NEW WORLD DICTIONARY 209 (2d ed. 1982).

53. Influence means "the ability of a person or group to produce effects indirectly by means of power based on wealth, high position, etc." WEBSTER'S NEW WORLD DICTIONARY 722 (2d ed. 1982).

54. For example, every secured creditor theoretically possesses the ability to influence the borrower to the extent that the lender has extended credit.

55. For a review of commercial lending law in this context, see Comment, *When a Security Becomes a Liability: Claims Against Lenders in Hazardous Waste Cleanup*, 38 HASTINGS L.J. 1261, 1271 (1987).

56. If room for error is considered, the creditors will be forced to err on the safe side of non-participation.

57. Steven A. Seelig, Director of the Federal Deposit Insurance Corporation's Division of Liquidation (FDIC), recently asked Senator Jake Garn (R-Utah) to "tighten language clarifying the agencies' immunity and make it transferrable to asset purchasers." *FDIC, Resolution Trust Corp. Seek Protection in Senate Bill Limiting Exposure Under CERCLA*, 21 Env't Rep. (BNA) 533-34 (July 27, 1990). Because of the Fleet Factors ruling, the FDIC could be liable for clean up costs on properties it holds for liquidation. FDIC has identified approximately 270 assets held by the agency for liquidation that have potentially serious hazardous waste problems. The book value of these properties is approximately \$365 million. Estimates for cleanup on these properties may be more than three times their market value. *Id.*

58. *Bankers, Lawyers, Businesses Endorse LaFalce CERCLA Lender Liability Legislation*, 21 Env't Rep. (BNA) 344 (June 15, 1990).

59. *Fleet Factors Complains to Supreme Court That CERCLA Ruling Disrupts Commercial Lending*, 21 Env't Rep. (BNA) 1116-17 (Oct. 5, 1990).

costs decrease. The public is therefore required to absorb the cleanup costs,⁶⁰ frustrating the goal of CERCLA.⁶¹

D. Possible Solutions to the Overly Broad Test in Fleet Factors

1. Legislative resolution

Senator Jake Garn (R-Utah) introduced Senate Bill 2827⁶² in March 1990, but the bill was stalled because environmentalists successfully argued that the measure was too broad and represented a sweeping bailout for banks.⁶³ Senator Garn has subsequently revised his proposal to address the controversial decision in *Fleet Factors*.⁶⁴ The proposed legislation limits the liability of depository institutions, other mortgage lenders, and the federal banking agencies for environmental releases they did not cause. The bill also protects lenders if they acquire, control, or hold property in a fiduciary capacity.⁶⁵ Further, it replaces the strict liability scheme currently used under CERCLA by limiting lenders' liability to the actual benefit conferred on them by an environmental cleanup operation.⁶⁶ Under the bill, liability is only triggered if the institution causes a release or if the institution has actual knowledge that a hazardous material is being stored on the property and fails to take reasonable actions necessary to prevent its release.

Small Business Committee Chairman John LaFalce (D-NY) is sponsoring House Resolution 4494⁶⁷ which excludes from liability both lenders when they foreclose on contaminated property and fiduciaries that take title or control of property as part of a trust or estate.⁶⁸ LaFalce's attempt to get the bill passed in 1990 failed. However, both the Garn bill and the LaFalce bill were reintroduced to Congress in March 1991.⁶⁹

60. When the responsible parties cannot pay for the cleanup, the government uses the money from the Superfund, which is supported by tax dollars from big industry and from the public at large.

61. Under this scenario, remedial response to Superfund sites will be inadequate due to lack of funding. The goals of CERCLA will be frustrated because Superfund sites will not be cleaned up, and those sites that are recovered will be financed by the Superfund itself (the taxpayers).

62. S. 2827, 101st Cong., 2d Sess., 136 CONG. REC. 9217 (1990).

63. *Garn, Lautenberg Drafting Compromise Bill to Shield Banks from Superfund*, 11 Inside EPA Weekly Rep. (Inside Wash.) No. 41, at 6 (Oct. 12, 1990).

64. *Utah Senator Submits Lender Liability Bill: House Measure Continues to Gather Sponsors*, 21 Env't Rep. (BNA) 482 (July 13, 1990).

65. *Id.*

66. *Id.*

67. H.R. 4494, 101st Cong., 2d Sess., 136 CONG. REC. 1503 (1990).

68. *Bankers, Lawyers, Businesses Endorse LaFalce CERCLA Lender Liability Legislation*, 21 Env't Rep. (BNA) 344 (June 15, 1990).

69. S. 3279, 102nd Cong., 1st Sess., 137 CONG. REC. 3279 (1991) (Garn Bill); H.R. 1769,

Legislative correction will probably be the most effective and efficient means of revitalizing the secured creditor exemption under CERCLA. A potential problem, though, is that the legislative body is extremely sensitive to political lobbying and to influence from various groups. This sensitivity, however, can help create a bill that accomplishes the overall goals of cleaning up the environment while at the same time allowing the financial community to provide adequate services to the struggling economy.

2. *Administrative rule-making resolution*

James Strock, EPA Assistant Administrator for Enforcement, told a House panel that a rule to preserve the secured creditor exemption under CERCLA is under development.⁷⁰ He reported:

In sum, we believe that a rule or legislation that defines a 'safe harbor' in which lenders could take responsible actions without incurring CERCLA liability is a valuable approach. Although EPA favors an administrative rule-making rather than a legislative attempt to clarify the status, if Congress concludes that legislation is necessary, EPA would not oppose legislation that is narrowly focused on the lender liability issue and includes the provisions mentioned.⁷¹

The proposed rule defines the term "participating in the management" and also describes actions that would invoke liability on secured lenders.⁷² Since the EPA is experienced in promulgating rules governing the environment, courts tend to take the slightest ambiguities in

102nd Cong., 1st Sess., 137 CONG. REC. 1769 (1991) (LaFalce Bill). The Garn bill is very similar to Senate Bill 2827, but does contain certain modifications made after testimonies received during banking committee hearings on Senate Bill 2827. 137 CONG. REC. 3279 (1991). The LaFalce bill however has undergone considerable modification and is based on a draft rule prepared by the EPA on the secured creditor exemption. 137 CONG. REC. 1769 (1991). For a further discussion of the proposed EPA rule, see *infra* note 72.

70. *EPA Official Tells House Panel of Shift in Policy Towards Lenders, CERCLA Liability*, 21 Env't Rep. (BNA) 756 (Aug. 10, 1990).

71. *Id.*

72. Participation in the management of a facility is defined as "actual operational participation by the lender, and does not include the mere capacity or ability to influence facility operations." *EPA Draft Proposal Defining Lender Liability Issues Under The Secured Creditor Exemption of Cercla*, 21 Env't Rep. (BNA) 1162, 1165 (Oct. 12, 1990). Although this rule reflects the "operational test," some serious procedural defects may decrease its enforceability. First, since the EPA is promulgating the rule as an interpretative rule, it may give guidance to courts, but it is not legally binding on them. *Batterton v. Francis*, 432 U.S. 416, 425 n.9 (1977). Second, the proposed rule does not discuss the applicability of the rule in citizen suits. Therefore, the rule will be used when the EPA is a party. If, however, the suit involves a "citizen suit plaintiff," the rule could be deemed irrelevant. Another potential problem is that an agency retains the right to change or discontinue following a rule that it has promulgated. *American Petroleum Inst. v. United States Envtl. Protection Agency*, 906 F.2d 729, 738 n.11 (D.C. Cir. 1990).

the rules and resolve them consistent to the broad reaching goals set forth by the EPA. This tends to result in far-reaching decisions that transform slight ambiguities into subjectively-based monumental decisions never contemplated by those who drafted the rules.⁷³

3. *Judicial resolution*

Judicial resolution is arguably the most inefficient method of remedying the present issue. Realistically, however, the courts are where the issue will be debated during the next several months. In their efforts to resolve lender liability issues, courts should take note of the current legislative and administrative efforts to address the role of the secured creditor exemption under CERCLA. Sweeping statutory exemptions under the rug with the "overwhelmingly remedial goals" of CERCLA is no longer justifiable. Clearly, such results were never the intent of the statute. Until the statute is amended or altered, the courts should apply the actual participation test discussed in *Mirabile*.⁷⁴ The *Mirabile* test more closely reflects both the current intent of Congress and the EPA regarding the secured creditor exemption.

IV. CONCLUSION

The "capacity to influence" test used by Eleventh Circuit in *Fleet Factors* is vague and counterproductive to the goals of CERCLA. Until the secured creditor exemption is clarified by Congress or the EPA, courts should apply the "actual participation standard" (being involved in the day-to-day operations of the facility) as discussed in *Mirabile*.⁷⁵

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73. *Fleet Factors* is a classical example. Here, broad judicial interpretation of CERCLA's goals has essentially eliminated any protection previously intended in the secured creditor exemption. Thus, while construing those goals, one judicial eye remains wide open to the light of liability while the other is blinded by "overwhelming" statutory goals. This judicial vision purports to follow congressional intent but may be nothing more than a respectful wink.

74. *United States v. Mirabile*, No. 84-2280, slip op. at 3 (E.D. Pa. Sept. 6, 1985).

75. *Id.*